THE HON'BLE Ms. JUSTICE G. ROHINI

WRIT PETITION No.22014 OF 2005

ORDER:

This writ petition is filed seeking a Mandamus declaring the action of the 1st respondent in disqualifying the petitioner and not opening the price bid of the petitioner with reference to the tender Notification No.35/2005-06 dated 30.08.2005, as arbitrary and illegal.

The facts, in brief, are as under:

The 2nd respondents-Chief Engineer RWS, Panchayat Raj, issued tender Notification No.35/2005-06, dated 30.08.2005, in "e-procurement", notifying bids for the work "providing drinking water supply to Dornakal Urban Town in Warangal District". The estimated value of the work was Rs.26,647,547/-. Both individual bidders as well as joint ventures were permitted to participate.

The writ petitioner, who claims to be the lead partner of the joint venture, consisting of the petitioner and one B. Prabhakara Reddy, filed the tender in response to the said tender Notification dated 30.08.2005. It is stated that all the tender documents, as required, were up loaded through "e-procurement" along with bank guarantee for 1% of the value of the work towards EMD and also Demand Drafts towards processing fee payable in favour of C1 India Tender Management Services. The 3rd respondent herein as well as one Dharma Reddy also filed their bids. It is not in dispute that the tender filed by Mr. Dharma Reddy was rejected in the initial stage itself. Thus, the writ petitioner and the 3rd respondents remained in the fray. According to the tender schedule, the date for opening the technical bid was 15.09.2005 and the price bid was required to be opened on 19.09.2005. However, the petitioner found from the web site that he was disqualified on opening the technical bid, and consequently, his price bid would not be opened. Since reasons were not forthcoming in the web site, the petitioner met the 1st respondent, who informed him that he was disqualified on three grounds, which are as under:

"1. Bank guarantee towards EMD was furnished through third party;

2. DD obtained in favour of C1 India Tender Management Services towards processing fee was not attested.

3. Declaration filed by the petitioner with reference to pending litigation does not contain the word “Arbitration”.

The petitioner contends that all the above said three objections are untenable, and they were intended only to eliminate him from the bid process so as to award the work in favour of the 3rd respondent. It is alleged that the respondents were proceeding to award the work in favour of the 3rd respondents in view of political influence by the local M.L.A. of Dornakal. It is also contended that whereas, the 3rd respondent quoted 4.23% excess over the estimated value of the work, the petitioner quoted 1.69% excess over the estimated value of the work, and therefore, he being the lowest tenderer, is eligible for award of the work, but for the untenable technical objections. Hence this writ petition.

On behalf of the respondents, the 3rd respondent - Superintending Engineer RWS (PR), Warangal Circle, filed a counter-affidavit, denying all the allegations made by the petitioner. Though the fact that three bids, including the bid of the petitioner and the 3rd respondent herein, were received through "e-procurement", has been admitted, it is stated that on opening technical bids on 15.09.2005, the petitioner and one Ch. Dharma Reddy, were disqualified since they did not meet the pre-qualification criteria as per the tender conditions. It is stated that the technical bids of the participants were evaluated by the 1st respondent basing on the pre-qualification criteria mentioned in Clauses 6.1; 9.1 (e); and 12.6 (viii) in the Instructions to the Tenderers, Volume-I, Part-A. The price bid of the only one bidder i.e., the 3rd respondents was opened on 27.09.2005, who quoted 4.23% excess over the estimated contract value, and was found to be in order. The technical bids of all the participants and opened price bid of the 3rd respondent were submitted to respondents 1 and 2 for finalization of the tenders as per G.O.Ms.No.195 dated 10.05.1999. Tender Committee was constituted for finalization of the tenders and after obtaining approval from the Tender Committee, final decision will be displayed by the respondents 1 and 2. Since the decision of the 1st respondent has not yet been finalized, the writ petition itself is premature and cannot be entertained.

A separate counter-affidavit has been filed by the 3rd respondent on the same lines stating that he being the only qualified bidder, the respondents have rightly opened his price bid and that the procedure adopted by the respondents 1 and 2 is in accordance with law.

I have heard the learned counsel for both the parties and perused the material on record.

At the out set, it would be appropriate to note the following three Clauses i.e., Clause Nos.6.1; 9.1 and 12.6, of the tender conditions, stipulated in the Instructions to the Tenderers, which are alleged to have been not complied by the petitioner.

> "6. **Earnest Money Deposit**
>
> 6.1 The tenderer shall furnish, as part of his tender, an EMD of Rs.2.67 lakhs (Rupees Two lakhs Sixty seven Thousands only) at the time of tendering through an unconditional Bank Guarantee pledged in the name of the Superintending engineer, Rural Water Supply, Warangal in the standard format valid for a period of 6 (six) months/180 days.
>
> Or
>
> Through Demand Draft from any Nationalized Scheduled Bank in favour of the Pay and Accounts Officer, Warangal. Failure in submission of EMD from Nationalized /Scheduled Bank will render the tender for rejection.
>
> 2. Any Tender not accompanied by an acceptable EMD including the Bank Guarantee not confirming to the format furnished with the Tender Documents or not being valid as described in sub clause 6.1 will be treated as non-responsive and rejected by the Department.
>
> .....
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> 9. **Eligibility and Qualifying Criteria**
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> .....
>
> (e) All the Uploaded documents/certificates/statements in supporting for the qualification criteria should be self attested by the tenderer otherwise tender will render for rejection.
>
> 12.6 The tender shall be rejected and the financial bid will not be opened if:
>
> .....
>
> viii) Self declaration to the effect of genuineness of certificates furnished by him and regarding history of litigation, arbitration and criminal cases pending against him/her are not uploaded."

The petitioner pleads that he filed all the relevant documents and certificates duly signed and also the declaration as required. He states that the Bank Guarantee as required under Clause 6.1 was issued in favour of the 1st respondents through one of his friends by name G. Narsimha Reddy. The said Bank Guarantee furnished by him is a valid Bank Guarantee and safeguards the interest of the Government in all respects, since the same cannot be treated as a conditional Bank Guarantee. Hence, the petitioner contends that there is absolutely no reason to reject the same.

Similarly, so far as the second objection is concerned, the petitioner contends that the requirement under tender condition that the bidder has to attest the documents, certificates etc., which were up loaded along with tender documents cannot be made applicable to the Demand Draft obtained towards processing fee, since the same cannot be said to be a document which requires attestation to prove its authenticity.

Though the fact that the Demand Draft was not attested has not been denied by the petitioner, it is his contention that if any such attestation is made on the Demand Draft, the Bank officials will object such an attestation when it is presented for encashment. At any rate, according to the petitioner, the said objection viz., non-attestation of Demand Draft, being technical in nature, cannot be a ground for disqualification.

So far as the third objection is concerned, the petitioner states that he filed the declaration specifically mentioning that there is no litigation pending, including criminal cases. Merely because the word 'Arbitration' is missing in the declaration, it cannot be said that the declaration is not in conformity with the tender conditions. The petitioner contends that the *pro-forma* prescribed in the tender document was filled up by him, and in all the columns it was mentioned **"NIL"**, which itself shows that the petitioner was not having any litigation pending. Therefore, there is absolutely no reason to infer that the declaration furnished by him is false and on that ground he cannot be disqualified.

On the other hand, the contention of the respondents is that since, admittedly, the petitioner has not complied with the above three conditions, he was rightly disqualified. According to the respondents, it is not necessary to go into the question whether the objections with regard to non-compliance with the tender conditions are technical in nature or not, but once the bidder fails to comply with the same,

disqualification would automatically follow.

In the counter-affidavit it has been explained that as per G.O.Ms.No.195, dated 10.05.1999, tender committee was constituted for finalization of tenders with the following members.

" 1. Engineer-in-Chief (PR)/Chief Engineer (PR) concerned;

2. Engineer-in-Chief (PH);

3. Principal Secretary to Government, Fin.& Plg. (Fin.Wing) or

his nominee"

The final decision on the tenders will be displayed only after obtaining approval from the tender committee. Thus, it is clear that the tender committee is the final authority and the matter is still pending consideration by the said authority. The evaluation report submitted by the Superintending Engineer has already been placed before the Tender Committee and the learned Government Pleader across the bar states that the Tender Committee will take into consideration all the aspects before finalizing the tender.

Having regard to the facts and circumstances of the case, I am not inclined to enter into the issue whether a particular tender condition is mandatory or directory. No Mandamus can be issued compelling the authorities to relax any particular tender condition assuming that the same is only directory. May be that the Tender Inviting Authority in its discretion may relax certain ancillary or minor stipulations in the tender conditions if it is of the opinion that such conditions are not essential conditions for compliance. Unless such discretion exercised by the authority either in insisting upon compliance or to waive a particular condition is shown to be arbitrary or perverse the interference of this Court under Article 226 of the Constitution of India is not warranted.

In the case on hand, since the matter is still pending before the Tender Committee, and no final decision, as such has been taken till today, I am of the opinion that it would be appropriate to leave the matter to the decision of the Tender Committee which consists of experts from several departments. It is for the said

experts to consider the effect of non-compliance of the tender conditions by the petitioner, which the petitioner claims to be minor and technical in nature.

In the circumstances, without expressing any opinion on merits, the writ petition is disposed of with a direction to the Tender Committee to consider all the objections raised by the petitioner and to take appropriate decision before finalizing the tenders relating to Tender Notification No.35/2005-06, dated 30.08.2005.

The writ petition is accordingly disposed of. No costs.

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(G. ROHINI, J.)

December 19, 2005.

Issue C.C. in two days.

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THE HON'BLE Ms. JUSTICE G. ROHINI

WRIT PETITION No.22014 OF 2005

December 19, 2005.

Between:

H.R. Venkat Reddy. .. Petitioner.

And

The Superintending engineer Rural Water Supply (PR),

Warangal Circle, Warangal District and three

others. .. Respondents.